COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	)	**D.T.E. 04-33**

VERIZON MASSACHUSETTS' REPLY IN SUPPORT OF
ITS MOTION TO HOLD THIS PROCEEDING IN ABEYANCE

Verizon Massachusetts ("Verizon MA") responds to comments filed by various parties[1] regarding its May 5th Motion to Hold this Proceeding in Abeyance ("Motion") until June 15, 2004. Verizon MA filed this Motion to facilitate commercial negotiations requested by the Federal Communications Commission ("FCC") in anticipation of the issuance of the D.C. Circuit's mandate in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). The parties, however, have used Verizon MA's Motion as a platform to press their arguments that Verizon MA should immediately implement the aspects of the *Triennial Review Order*[2] that benefit the competitive local exchange carriers ("CLECs"), but should wait for an

[1] Comments were filed by AT&T Communications of New England, Inc. ("AT&T"), Conversent Communications of Massachusetts, LLC ("Conversent"), the Competitive Carrier Coalition (the "CCC"), the Competitive Carrier Group (the "CCG"), MCImetro Access Transmission Services LLC ("MCI"), and Sprint Communications Company, L.P. ("Sprint").

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

indefinite period to implement other aspects that favor Verizon MA. Their efforts are exactly the sort of tactics that the FCC criticized in its *Triennial Review Order*.[3]

As demonstrated below, none of the parties offers a valid objection to Verizon MA's Motion. Rather, the CLECs seek to impose a number of conditions on any stay. The CLECs' demands are unreasonable and unlawful, and the Department should grant Verizon MA's Motion without imposing any conditions.

I. ARGUMENT

A. Contrary to the CLECs' Claims, the Department Cannot *Require* that Verizon MA Maintain the "Status Quo" During the Pendency of the Arbitration.

In their responses to Verizon MA's Motion, the parties ask the Department to condition any abeyance on Verizon MA's maintaining, at least until the end of the arbitration, all existing unbundled network element ("UNE") arrangements at existing prices. Sprint's Response, at 1; CCC's Response, at 1; CCG's Response, at 4-5; AT&T's Response, at 5-6; Conversent's Response, at 2-6; MCI's Response, at 2-3. The Department cannot impose this condition for the following reasons.

First, Verizon MA's Motion has nothing to do with the post-June 15th period and, therefore, it cannot serve as the basis for arbitrarily imposing open-ended conditions on Verizon MA, as the parties erroneously suggest.

Second, the CLECs' requests that Verizon MA maintain indefinitely all existing UNE arrangements, regardless of the D.C. Circuit's vacatur of the FCC's impairment rulings, are tantamount to asking the Department to stay an order of the U.S. Court of Appeals. To require

[3] *Triennial Review Order*, at ¶ 706 (in which the FCC admonished all parties "to avoid gamesmanship and behavior that may reasonably lead to a finding of bad faith" under Section 251(c) of the Telecommunications Act of 1996 (the "Act") and ruled that "parties may not refuse to negotiate any subset of the rules" adopted in the *TRO*.)

that Verizon MA continue to provide, until the end of the arbitration, items that Verizon MA no longer has any legal obligation to provide is plainly beyond the Department's jurisdiction and must be rejected.

Third, Verizon MA cannot be lawfully forced to forfeit its existing contractual rights for any period, either before or after June 15. Verizon MA is committed to maintaining the true *status quo* of existing contract rights and obligations, which include any rights Verizon MA may have to cease providing UNEs and to transition CLECs to alternatives to UNEs. Accordingly, the Department should reject the CLECs' request to take the unlawful step of issuing a blanket determination that Verizon MA must continue to offer existing UNE arrangements, regardless of what particular contracts or the federal courts may say.

As the Ninth Circuit has held, state commissions cannot make generic – or blanket - determinations in disregard of individual contracts. *Pacific Bell v. Pac-West Telecomm, Inc*., 325 F.3d 1114, 1125-26 (9th Cir. 2004) (holding that section 252 limits the power of state commissions to approving "new arbitrated interconnection agreements and to interpret existing ones *according to their terms*") (emphasis added). That approach, which is just what the CLECs urge in this case, would be "contrary to the Act's requirement that interconnection agreements are binding on the parties." *Id*.; *see also* Sprint's Response, at 1-2; CCC's Response, at 1; CCG's Response, at 4-5; AT&T's Response, at 5-6; Conversent's Response, at 2-6; MCI's Response, at 2-3. In addition, the FCC has made clear that any state attempt to require unbundling where the FCC specifically considered and rejected unbundling would be preempted. *Triennial Review Order*, at ¶ 195; *see also* FCC's Brief, *USTA v. FCC*, Nos. 00-0012, at 92-93 (D.C. Cir. filed Dec. 31, 2003).

Likewise, the Texas Public Utility Commission ("PUC") Order[4] cited by AT&T and Sprint does not support the CLECs' attempt to force Verizon MA to maintain UNEs that were delisted and/or were the subject of the D.C. Circuit's vacatur. AT&T's Response, at 6-7; Sprint's Response, at 2. In that generic arbitration of successor interconnection agreements, SBC assured the Texas PUC that it would "maintain the status quo of the parties' existing contractual rights."[5] Thus, the Texas PUC Order acknowledges SBC's assurance that "UNEs will continue to be offered consistent with those [SBC interconnection] agreements." *Texas Order*, at 1. This is exactly the same course Verizon MA intends to follow, both before and after June 15. In any event, a voluntary commitment (whatever its nature) of another company in another state does not supply any legal support for an order attempting to override federal law or the terms of Verizon MA's interconnection agreements with CLECs in Massachusetts.

Finally, Conversent goes even further than some other parties – asking that the Department require Verizon MA

> to continue offering UNES – particularly dedicated interoffice transport (including dark fiber interoffice transport) and high capacity loops – at the rates, terms and conditions in Verizon's wholesale tariff *until the FCC establishes new rules or the existing FCC rules are reinstated*.

Conversent's Response, at 1 (emphasis added). In support of that request, Conversent relies on a single statement by the Rhode Island Arbitrator in his April 9, 2004, Procedural Arbitration Decision (at 10) in Docket No. 3588, which provides that "the current terms of ICAs with CLECs for which VZ-RI has petitioned for arbitration can continue in effect as written in regards

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[4] Texas PUC Docket No, 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Order Abating Proceeding, dated May 5, 2004 ("*Texas Order*").

[5] Letter dated April 28, 2004, from M.T. VanBebber, SBC attorney, to Texas PUC Judges Cooper and Kang.

to those issues reversed, remanded and soon to be vacated by the D.C. Circuit Court. In other words, the status quo prevails." Conversent's request must be denied.

Contrary to Conversent's claims, neither this nor any other statement in the Rhode Island Procedural Arbitration Decision purports to require that Verizon Rhode Island ("Verizon RI") offer UNEs under a "wholesale tariff." Nor does this statement require Verizon RI to offer UNEs for any particular length of time, much less "until the FCC establishes new rules or the existing FCC rules are reinstated," as Conversent contends. Indeed, this statement does not even require Verizon RI to continue to offer UNEs *at all*. It merely says that the parties' interconnection agreements will remain in effect.

Like Verizon RI's interconnection agreements, many, if not all, of Verizon MA's agreements contain terms that allow Verizon MA to discontinue provisioning network elements that are no longer required to be unbundled, under conditions and through processes defined in the agreements. Thus, maintaining the status quo means that all parties – including Verizon – preserve their rights under existing interconnection agreements. Accordingly, Conversent's request that the Department drastically rewrite the parties' contracts – without the benefit of briefs, testimony, and evidence of any kind or hearing – is antithetical to preserving the status quo and should be rejected by the Department.

B. Some CLECs Unreasonably Request that the Department Condition Granting Verizon MA's Motion on the Provision of Selected Terms under the *TRO*.

AT&T, MCI, the CCG and Conversent, in effect, seek a preliminary injunction immediately implementing selective terms of the *Triennial Review Order* that are favorable to those CLECs. In particular, they urge the Department to require Verizon MA to implement immediately the *TRO* rules regarding network routine modifications, the commingling of UNEs with wholesale services, and/or the conversion of special access facilities to expanded extended

loops ("EELs"), without first executing contract terms governing those items. AT&T's Response, at 3-5; CCG's Response, at 1-3; Conversent's Response, at 6-9; MCI's Response, at 3-4. The CLECs' requests are unreasonable and must be denied.

As Verizon MA previously stated in Response to Parties' Motions to Dismiss filed April 9, 2004 (at 21), the *TRO*'s requirement that incumbent local exchange carriers ("LECs") undertake routine network modifications to UNEs is a *new* legal requirement.[6] Under the prior rule, Verizon MA was not required to perform those modifications *at all*, much less provide these services for free. Accordingly, contrary to these CLECs' claims, this new requirement constitutes a change of law, and the CLECs' interconnection agreements ("ICAs") must be amended to incorporate terms, conditions and rates upon which Verizon MA will provide these services. The same is true for the *new* commingling and conversion rules established in the *Triennial Review Order*.

For instance, AT&T alleges that although it "has met the [*TRO*] required criteria" that permit CLECs "to order new circuits as EELs or to convert existing special access circuits to EELs," Verizon MA "unlawfully refused to provide EELs at TELRIC prices in Massachusetts" until AT&T and Verizon execute an amended ICA. AT&T's Response, at 4. Contrary to

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[6] The FCC made clear that its ruling concerning network modifications was unprecedented and explicitly referred to this requirement as "adopt[ed] today" – which contradicts the CLECs' claims that this was pre-existing. *Triennial Review Order*, at ¶ 632. Moreover, the FCC has previously found Verizon's policy regarding the type of provisioning activities it would undertake to make UNEs available to be consistent with the requirements of Section 251(c)(3) of the Act. 47 U.S.C. § 251(c)(3); *see also Application by Verizon New Jersey Inc., et al., for Authorization to Provide In-Region InterLATA Services in New Jersey*, Memorandum Opinion and Order, 17 FCC Rcd 12275, at ¶ 151 (2002) ("*New Jersey 271 Order*"); *Application by Verizon New England Inc., et al., for Authorization to Provide In-Region InterLATA Services in New Hampshire and Delaware*, Memorandum Opinion and Order, 17 FCC Rcd 18660, at ¶¶ 112-14 (2002) ("*New Hampshire/Delaware 271 Order*"); *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880, at ¶¶ 141, 144 (2002) ("*Virginia 271 Order*"). Thus, the CLECs cannot reasonably argue that Verizon MA is required to undertake additional provisioning activities in response to the *Triennial Review Order*, while simultaneously arguing that Verizon MA's legal obligations are unchanged.

AT&T's claims, Verizon MA is not in violation of the *Triennial Review Order* – or its tariff, which makes UNEs available as EELs. MA DTE Tariff No. 17, Pt. B, Sec. 13.

MA DTE Tariff No. 17 does not require Verizon MA to provision EELs for "new or converted circuits meeting the new eligibility criteria issued by the FCC in the *TRO*." AT&T's Response, at 5. Indeed, that tariff neither provides for eligibility criteria under the *TRO*, nor authorizes the commingling of EELs with other, non-qualifying facilities, as AT&T erroneously contends.[7] AT&T's Response, at 2. In fact, Verizon MA cannot be required to provide such services until the parties are contractually bound by applicable terms, conditions and rates,[8] as the FCC contemplated.

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[7] AT&T's reliance on MA DTE Tariff No. 17, Part B, § 13.1.1.D is misplaced. That provision requires Verizon MA to amend the Tariff "to include any future FCC-approved significant local usage options." The tariff as written allows a CLEC to obtain EELs if it falls within one of the FCC's former "safe harbors," or "significant local usage options." The FCC's *Triennial Review Order* did not, however, add another safe harbor - as anticipated by the Tariff. Rather, the FCC eliminated the entire concept of safe harbors in favor of the new eligibility criteria. No change to the Tariff is required on that account.

Moreover, AT&T and the other CLECs must still amend their ICAs to provide for the new features of EELs under the *Triennial Review Order* before those features would be available to them. The Department has previously held that tariff provisions do not supersede arbitrated or negotiated ICAs and are "applicable to interconnection agreements only where the parties to the agreement have explicitly provided in the agreement that an applicable tariff shall control the terms of the offering." D.T.E. 98-57 (Phase I). *Order*, at 19 (March 24, 2000). The Department determined that this "promote[s] fair competition by ensuring that all carriers retain the benefits of their bargains, and … further[s] the preference for negotiated agreements expressed in the Act." *Id*.

[8] As background, Verizon sent CLECs a letter on October 2, 2003, which proposed a draft *TRO* Amendment that was available on Verizon's wholesale website to all CLECs via an electronic link provided in the letter. The letter invited CLECs to review the draft amendment and to contact Verizon to proceed with completion of the contracting process. The letter further advised CLECs that the *Triennial Review Order* deemed October 2, 2003, as the notification request date for contract amendment negotiations, and that, in accordance with 47 U.S.C. § 252(b), either party could request arbitration during the window from the 135th day to the 160th day after such negotiation request date.

AT&T received such notification from Verizon regarding its draft *TRO* Amendment, yet declined to provide Verizon with a marked-up version of the proposed Amendment until February 6, 2004 – more than four months from the date of Verizon's initial proposal and just ten days before the arbitration window opened pursuant to the *Triennial Review Order*. Moreover, AT&T's marked-up version came only after Verizon – in a January 9, 2004, letter - urged AT&T to provide a substantive response regarding Verizon's draft amendment. In that letter, Verizon *again* informed AT&T that requests for conversion of existing special access circuits to EELs could be processed under the pre-*TRO* rules until an amended ICA was implemented pursuant to the *Triennial Review Order*. Since receiving AT&T's marked-up version, Verizon has engaged in - and continues to engage in – regularly scheduled, constructive negotiations with

Even AT&T does not assert, as grounds for allowing it immediate access to EELs under the *Triennial Review Order*, that there is no need to amend its ICA. On the contrary, AT&T has proposed extensive changes to the section of Verizon's *TRO* Amendment governing EELs in its Response to Verizon MA's Petition for Arbitration (Exhibit 1, §3.6). Clearly, AT&T's objective here is to convert special access facilities to EELs and to commingle EELs with other facilities immediately under the new *TRO* rules, without first amending its interconnection agreement (through negotiation or arbitration) to provide the terms necessary to govern access to those EELs. AT&T has offered no justification for piece-parting the ICA in this manner and giving it such a prejudicial advantage in contract negotiations. Nor has AT&T offered any justification for allowing it to take immediate advantage of provisions of the *Triennial Review Order* favorable to AT&T, but requiring Verizon MA to wait for an indefinite period to implement the *TRO* terms that favor Verizon MA.

In short, AT&T's proposal to implement just *one* aspect of the *Triennial Review Order* seeks – as a condition to stay this proceeding for a month – is not only tantamount to preliminary injunctive relief, but is precisely the kind of gamesmanship that the FCC sought to avoid. *Triennial Review Order*, at ¶706 ("parties may not refuse to negotiate any subset of the rules we adopt herein."). Further, AT&T has not even alleged a risk of irreparable harm, as required to support a preliminary ruling in its favor. AT&T claims only that it must currently pay special access rates for certain facilities, and that "Verizon's refusal to provide these circuits as EELs at TELRIC rates significantly compromises AT&T's ability to compete against Verizon." AT&T's Response, at 5. Of course, the loss of money is not irreparable harm, AT&T has not supported its claim with an affidavit regarding its finances, and the alleged temporary impingement on

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AT&T regarding the *TRO* Amendment. Therefore, contrary to AT&T's and MCI's assertions, Verizon has been actively involved in CLEC negotiations. AT&T's Response, at 1-2; MCI's Response, at 3-4.

AT&T's ability to compete would not, even if proven, amount to irreparable harm justifying the order AT&T seeks.[9] Accordingly, those arguments are unfounded and must be rejected by the Department.

C. Sprint's Request that the Department First Rule on Its Motion to Dismiss Should be Rejected.

Although Sprint states that it "does not oppose" Verizon MA's Motion to stay this proceeding, it nevertheless urges the Department to dismiss Verizon MA's Petition to Arbitrate instead of granting an abeyance of the arbitration. Sprint's Response, at 1-2. Sprint's request for dismissal, rather than abeyance, makes no sense.

First, the arguments raised by Sprint for dismissal of this proceeding, for the most part, pertain only to Sprint. Thus, even if Sprint's arguments were correct (and they are not), they would not justify dismissal of Verizon MA's Petition as to *other* CLECs. Indeed, some CLECs (such as AT&T and MCI) do not support dismissal of Verizon MA's Petition.

Second, Sprint's statement that if it is dismissed from this proceeding, it "reserves the right to participate in the proceeding to protect its interests" makes no sense. Sprint's Response, at 2. If Sprint is dismissed from the arbitration, as requested in its March 15, 2004, Motion, then it necessarily loses any right to participate in the proceeding. Thus, in the event that the Department declines (as it should) to dismiss the entire proceeding in response to Sprint's Motion to Dismiss, then Sprint apparently does not want a dismissal as to Sprint *only* (despite its request for this very relief). Therefore, a ruling on Sprint's Motion would be futile, since Sprint would just ask to be reinstated as a party. Third, to the extent that parties have urged dismissal

[9] Likewise, AT&T's assertion that it is prejudiced by delaying the arbitration until June 15th is fallacious. AT&T's Response, at 3. First, the requested abeyance is relatively brief and, to the extent that AT&T and others use this time to focus on negotiations with respect to the *Triennial Review Order*, they can avoid litigation that has greater potential to delay implementation of the *TRO* rulings. In addition, AT&T will suffer no particular prejudice because of an abeyance, which will apply equally to all parties and to all aspects of the *Triennial Review Order*, including those that favor Verizon MA.

because of legal uncertainty,[10] then Verizon MA's Motion to stay the proceedings largely moots those arguments. Because an abeyance would remove those CLEC arguments, there is no reason for the Department to consider them. Therefore, it would be illogical for the Department to rule on Sprint's Motion to Dismiss first, rather than Verizon MA's Motion for Abeyance.

Fourth, abeyance is a much more efficient course than dismissal of Verizon MA's Petition, as Sprint suggests. If the Department dismisses this Petition, Verizon MA will re-file because at least some interconnection agreements may require modification to reflect the results of the *Triennial Review Order* and *USTA II*. The parties, in turn, will have to respond to Verizon MA's Petition once again. Instead of wasting time and resources repeating this process, it would be more efficient to reopen the proceeding after June 15. At that time, the parties will be able to identify definitively the issues for resolution in the docket and quickly move to briefing.

Moreover, if the Department orders dismissal, it can expect to be inundated with petitions and complaints, as parties attempt to exercise what they perceive to be their rights under the *Triennial Review Order*. For example, there are several elements of Verizon MA's network that it no longer has any obligation to unbundle under Section 251(c)(3) of the Act, and as to which the FCC's prior rules requiring unbundling were twice vacated. The pleadings filed thus far demonstrate that Verizon MA and the CLECs disagree about the legal effect of these facts on their existing interconnection agreements; those disputes will not disappear with the dismissal of this proceeding.

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[10] It should be noted Verizon MA - in its Response to Parties' Motions to Dismiss filed April 9, 2004 (at 14), - demonstrated that dismissal is not warranted because the proposed *TRO* amendments do *not* include those portions of the *Triennial Review Order* that were vacated by the D.C. Circuit. Rather, they reflect those *TRO* rulings that were either affirmed on appeal or not challenged in the first place and, therefore, are binding law that must be promptly implemented.

II. CONCLUSION

Verizon MA filed its Motion for an abeyance in the hope of facilitating the FCC-requested commercial negotiations that many CLECs claim to support. But the CLECs' attempts to impose unreasonable and unlawful conditions on the granting of that abeyance request are directly contrary to the FCC's objective of relying on negotiation, rather than litigation, to resolve network access questions. Accordingly, the Department should reject the CLECs' arguments and grant Verizon MA's Motion without condition. Verizon MA further respectfully states that it would withdraw its Motion before agreeing to any of the conditions proposed by the CLECs here.

Respectfully submitted,

VERIZON MASSACHUSETTS

By its attorneys,

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Bruce P. Beausejour
Barbara Anne Sousa
185 Franklin Street – 13th Floor
Boston, MA 02110-1585
(617) 743-7331

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